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May 26, 1992

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Federal Communications Commission
Office of the Secretary

Ms. Donna R. Searcy
Secretary
Federal Communication Commission
1919 M Street, NW -- Room 222
Washington, DC 20554

Re: Telephone Consumer Protection Act of 1991; 47 CFR Parts 64 and 68 [CC
Docket No. 92-90; FCC 92-176]

Dear Ms. Searcy:

The American Bankers Association (ABA) appreciates this opportunity to comment on the Federal Communications Commission's (the Commission) proposed regulations to implement the Telephone Consumer Protection Act of 1991 ("TCPA" or "the Act"). The American Bankers Association is the national trade and professional association for America's commercial banks, from the smallest to the largest. ABA members represent about 90 percent of the industry's total assets. Approximately 94 percent of ABA members are community banks with assets of less than \$500 million.

The TCPA amends Title II of the Communications Act of 1934 by adding, among other things, restrictions on the use of automated telephone dialing and prerecorded message systems. The Commission is mandated by the Act to adopt implementing regulations, including definitions of various terms and exemptions permitted under the Act.

On balance, we believe the Commission's Notice of Proposed Rule Making (NPRM) already reflects a sound and thorough evaluation of how best to protect residential privacy concerns, while at the same time recognizing how the use of autodialing and prerecorded message systems have contributed to telecommunications technology and American commerce. ABA's comments below address issues raised by the Commission in its request for comment and are confined largely to requests for a clarification of key terms and provisions of the Act in light of the commercial banking industry's reliance upon autodialing systems in day-to-day debt collection operations.

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I. Section 227(a): Definitions—

Automated Telephone Dialing System

The TCPA defines automatic telephone dialing systems subject to restrictions imposed by the Act as those systems that have the capacity "(A) to store or produce telephone numbers to be called, using a random or sequential number generator, and (B) to dial such numbers."

Autodialing systems typically have the capacity to store and produce telephone numbers in sequence or at random. This does not necessarily mean they are used in this function. Routinely, they are used to store and produce numbers of existing, past, or potential customers that have furnished their telephone number to the calling party. Consequently, ABA believes the Commission should clarify in its definition of "automatic telephone dialing system" that restrictions under the regulation do not apply to those systems used strictly to dial pre-programmed telephone numbers.

Telephone Solicitation to Residential Subscribers

In its definition of "telephone solicitation," the Act exempts from coverage calls initiated "to any person with whom the caller has an established business relationship." However, the Act does not clearly define what constitutes such a relationship.

ABA believes the regulations should clarify that the term "established business relationship" includes calls initiated by a business (or by another acting on its behalf) to parties:

- with whom the business has an ongoing business relationship;
- with whom the business has conducted a business transaction within the past year;
- with whom a business relationship has been terminated within the past year;
- who have submitted an application to the business for products or services; or,
- who have given their phone number to the business when making inquiries about or applications for its products or services.

Prior Express Consent

As noted below, calls initiated with a prerecorded message are prohibited unless the caller has the "prior express consent of the called party." The Act does not define what constitutes prior express consent.

To avoid possible misinterpretation of the Act and its implementing regulations, ABA

believes that the Commission should specifically define "prior express consent of the called party." Such definition should include instances where the party has provided the caller with: (1) oral or written consent to receive such calls; or (2) has provided the number called as a number at which the party can be reached.

II. Section 227(b): Restrictions on the Use of Automated Telephone Equipment--

Under Section 227(b)(1)(B) of the Act, non-emergency calls initiated to residential subscribers that utilize an artificial or prerecorded message are prohibited unless the caller has obtained the express prior consent of the called party. The Act authorizes the Commission to adopt exemptions to this general prohibition.

In addition to the Act's exemption of calls initiated with the express prior consent of the called party, and to the Commission's proposed exemption of calls to a party with which the caller has a prior or existing business relationship, ABA believes the Commission should also adopt the following exemptions from the general prohibition of non-emergency calls utilizing prerecorded messages:

- calls initiated to a number provided by the called party even if another party answers or the called party's number has subsequently changed;
- calls where a prerecorded message is limited to a simple request that the answering party hold open the line until a live operator becomes available; or
- calls to a party with a bill or debt outstanding (subject to applicable provisions of the Fair Debt Collection Practices Act).

In our view, these exemptions are consistent with legislative intent that the TCPA not disrupt communications relationships between the caller and the party called, or hinder improvements in communications technology.

Regarding the specific exemption ABA seeks for debt collection calls, it is common practice for banks to telephone customers when loan payments are not made on a timely basis. Customers are often concerned about their credit profiles and appreciate reminder calls when a payment is overdue. As noted by the Commission in the NPRM, the use of automated dialing and prerecorded message systems greatly improves a bank's ability provide this service to the customer in an efficient and cost-effective manner. Moreover, such calls are clearly initiated to a party with which the caller has a business relationship; they do not infringe on the called party's privacy rights as designated by the Act; and, finally, they do not constitute a solicitation.

Finally, ABA believes the regulations should also protect businesses which inadvertently dial a number in a protected class under the Act (e.g., emergency numbers, cellular lines, etc.)

when the called party has provided the business with the telephone number as a number at which that party can be reached, or if the business has unintentionally entered an incorrect number into its system.

III. Section 227(d): Technical and Procedural Standards—

Section 227(d)(3) of the TCPA specifies that artificial or prerecorded messages must disclose the identity of the business, as well as the telephone number or address of the business, initiating the call. This requirement might conflict in certain instances with provisions of the Fair Debt Collection Practices Act (FDCPA). Specifically, the FDCPA prohibits live operators employed by a creditor (or a third-party acting on behalf of a creditor) attempting to collect a debt from identifying the collecting entity to the party answering the call. However, we do not believe that recorded messages which simply identify the company calling and provide a return telephone number violate the intent of the FDCPA.

Due to the potential for conflict with the FDCPA, ABA believes the Commission should add appropriate language to its implementing regulations to the effect that no requirements under Section 227(d)(3) of the Act be deemed to preempt the requirements of other Federal or state laws. Furthermore, any commentary accompanying the implementing regulations pertaining to Section 227(d)(3) of the Act should make clear that this section does not require creditors, or those acting on their behalf, to utilize identifying messages that conflict with the prohibitions contained in the FDCPA. It should also provide guidelines as to what constitutes an acceptable recorded message.

IV. Other Issues—

Treatment of Affiliates and Third Party Agents Under the Act

It is common practice for banks to contract out debt collection and other functions (including endorsement of third-party products or services) to third-parties. These third-parties are acting as agents of the bank. Calling functions related to a bank's business may also reside with an affiliate of the bank. Consequently, ABA supports the Commission's interpretation in the NPRM that calls by an agent of the bank are covered by the exemption for a prior or existing business relationship with the bank. ABA also believes that the Commission should clarify that calls initiated by an affiliate of the bank are also treated under the regulations as if initiated by the bank itself.

National Database

It would appear to the ABA that the cost of developing, implementing and maintaining a national "do-not-call" database is prohibitive. Also, unless the consistent accuracy of such a database could be assured, consumer interests would not be well served.


Network Technologies

Network technologies which would allow the debtor to block all telephone calls from particular prefixes, area codes, etc. could pose a significant threat to the collection and recovery of outstanding or charged off debts. During the course of collection of most such accounts, telephone conversations with the debtor play a key role in successfully curing the delinquency, whereas, in many instances, attempts to establish communication via the mails are unsuccessful. The type of blocking technology described in the NPRM could make it difficult to reach affected customers and thus hamper efforts by a creditor to work out satisfactory repayment terms with the debtor. Consequently, any action that reduces the ability of creditors from establishing contact with delinquent borrowers by telephone and negotiating repayment terms would inevitably lead to greater expense for both parties.

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The ABA thanks the Commission for considering the views of the commercial banking industry on the proposed regulations implementing the TCPA. We would be happy to discuss this issue further at your request.

Sincerely,



Philip S. Corwin

cc: Olga Madruga-Forti, Esq.
Attorney
Domestic Services Branch, Domestic Facilities Division
Common Carrier Bureau
Federal Communication Commission